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SUPREME COURT, U.S.

In the Supreme Court of the United States

October Term, 1972

No. 71-1[illegible]

14,340 Moles Fraleigh, Jr. College Watch Dealers Corporation, Stanley Gutz, Petitioner

v.

United States of America

No. 71-1[illegible]

Goodwin Lee, Doing Business as Westbury Sales Co., Petitioner

v.

David M. Kennedy, Secretary of the Treasury, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief for the United States in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-344

16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS, PETITIONER

v.

UNITED STATES OF AMERICA

GOODWIN LEE, DOING BUSINESS AS WESTBURY SALES CO., PETITIONER

v.

DAVID M. KENNEDY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is reported at 314 F. Supp. 179.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. The petition for a writ of certiorari was filed on September 7, 1971. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the definition of "firearms" in the Gun Control Act of 1968 (18 U.S.C. 921(a)(3)) is unconstitutionally vague.

2. Whether under the circumstances of this case the United States should have been held estopped from seizing and condemning the starter guns.

STATUTES INVOLVED

Title 18 U.S.C. 921—Definitions—

(a) As used in this chapter.

* * * *

(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive * * *.

Title 18 U.S.C. 924—Penalties—

* * * *

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forefitures under the provisions of this chapter.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of New York, 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns belonging to petitioner were ordered condemned as forfeit to the United States because they were readily convertible to fire live ammunition (18 U.S.C. 921(a)(3); Pet. App. B; 314 F. Supp. 179).[1] The court of appeals affirmed (Pet. App. A).

Petitioner is not registered under the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*) as a firearms dealer (I Tr. 67-68).[2] In 1967, petitioner traveled to Como, Italy, to negotiate with the Molso Company concerning the manufacture by Molso of .22 caliber

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[1] An action by petitioner against the Secretary of the Treasury and other officials to enjoin the confiscation suit was dismissed for lack of subject matter jurisdiction (Pet. App. B, 9a).

[2] "Tr." refers to the two-volume transcript of proceedings in the district court.

starter guns for import by petitioner to the United States (I Tr. 26-28). Thereafter, sample starter guns were sent to petitioner Lee for the purpose of testing for compliance with the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*).

On January 7, 1969, petitioner delivered a sample of one model of the starter guns, designated model DA-1, to the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service for testing (I Tr. 38; II Tr. 50, 54). Agent Westenberger of the Division tested the sample and determined that it was not readily convertible into a device capable of expelling a projectile by the action of an explosive, and, for that reason, not a "firearm" within the meaning of 18 U.S.C. 921(a)(3), *supra*, p. 2. On January 13, 1969, the Division sent petitioner a letter informing him of this determination (II Tr. 54-55; I Tr. 38-39).

On or about April 1, 1969, petitioner gave the Division two more prototypes, designated models DA-3 and DA-4. Agent Westenberger tested them for conformity with the Act and determined that they were incapable of ready conversion. Petitioner was so informed by letter on May 8, 1969 (II Tr. 57-59, 61; I Tr. 53-54). Prior to receipt of the prototype from Italy and prior to receipt of the May 8, 1969 letter from the Division, petitioner had received a letter from the Molso Company, dated March 22, 1969, relating to the anticipated delivery to petitioner of prototypes DA-3 and DA-4, which in pertinent part, read (I Tr. 46-47):

> * * * According to our experience the sample B [DA-4] should not be accepted by Washington offices as not difficult to drill and suitable to shoot. Sample A [DA-3] should be acceptable as impossible. * * *

Petitioner, nevertheless, ordered and received substantial quantities of the manufactured version of models DA-4 and DA-1 (but no model DA-3's), between May 8 and September 30, 1969.

On August 15, 1969, Agent Wessler of the Alcohol, Tobacco and Firearms Division, acting in an undercover capacity, purchased a production line version of DA-1 from one Mitchell Mogel, a licensed firearm dealer, who had obtained it from petitioner (I Tr. 126). At the time of Wessler's purchase of the gun in August, he did not know and was not told that Mogel had obtained it from petitioner (I Tr. 133-134). The agent took the pistol home and was able to convert it to fire live ammunition in only a few minutes. Thereafter the gun was sent to the Division office in Washington and was returned to Wessler in October 1969, and turned over by him to another agent (Rowley) who was conducting the investigation (I Tr. 127-130). Agent Rowley, acting in an official capacity, first visited Mogel on October 8, 1969. At that time Rowley asked and was told by Mogel that Mogel obtained the pistols from petitioner (I Tr. 136-137). During that October 8 visit Rowley advised Mogel that the guns were "firearms" within the Gun Control Act of 1968 (I Tr. 138). On or about October 13, 1969, Mogel called petitioner and informed

him of Rowley's visit and the possibility of a violation (I Tr. 59). Thereafter, petitioner attempted to stop a shipment of guns that had been previously ordered from Molso. He was unable to stop shipment, but prevented them from being formally entered into the United States. Those guns are therefore not a part of the present case (I Tr. 59-61; see Pet. 9).

On November 4, 1969, Agent Rowley obtained a production model DA-4 from Mogel and converted it to fire live ammunition in approximately five or six minutes (I Tr. 143-145). On November 6, 1969, Rowley notified petitioner that the permits for the starter guns were being reconsidered and that he should not sell any more guns pending further tests. Petitioner did not make any further sales (I Tr. 146-148). On December 8, and December 22, 1969, petitioner's stock of starter guns was seized by agents of the Division pursuant to 18 U.S.C. 924(d), *supra*, p. 3 (I Tr. 64, 153-154).

Agent Rowley subsequently tested five of the guns and was able to convert all of them using an electric drill. Four were converted in periods of time between four and twelve minutes and found capable of firing live ammunition (II Tr. 7-12). Agent Westenberger also tested a number of the seized guns, including model DA-1 as well as DA-4. Each was converted within a matter of minutes and each fired live .22 ammunition (II Tr. 65-70).

Harold Weinberg, an independent metallurgical engineer, testified that the metals used to obstruct the barrels in the seized manufactured models were

not as hard as those used in the hand-made prototypes which the Division had previously advised petitioner did not violate the Act (I Tr. 111-115). Unlike the prototypes, the production models were easily convertible into weapons capable of firing live ammunition (I Tr. 114-115; II Tr. 71).

ARGUMENT

1. Petitioner contends that the language in 18 U.S.C. 921(a)(3) *supra*, p. 2, "may readily be converted to expel a projectile," is unconstitutionally vague and that he was denied due process of law by the failure of the Secretary of the Treasury to prescribe additional standards defining the statutory term "firearm." The contention that the statute is vague is plainly insubstantial and was properly rejected in the opinion of the court below (Pet. App. A), upon which we rely. Moreover, the evidence clearly established that the guns seized and confiscated were readily convertible into weapons which could fire and thus clearly were "firearms" within the meaning of the Act.

2. Petitioner also contends that the government should be estopped from demanding forfeiture on the ground that it first approved petitioner's prototype starter guns and then stood by from August 15, 1969, to November 6, 1969, knowing that petitioner's pistols were not in compliance with the law, while petitioner imported large quantities of them (Pet. 23). The contention was not advanced below and thus is not properly before the Court. *Lawn* v. *United*

States, 355 U.S. 339, 362-363, n. 16. In any event, the record is barren of any evidence that the government stood by, between August 15 and November 6, 1969, knowing petitioner was importing illegal guns, and affirmatively shows that petitioner had no reasonable basis to rely on the Division letters advising him that the hand-made prototype starter guns were not in violation of the Act.

The record does not show the alleged three-month delay by the government between notice to it of petitioner's illegal activity and notice to petitioner of his non-compliance with the Act. Although Agent Wessler knew on August 15, 1969, that the starter pistol he purchased from Mogel was convertible, did he not know that it was petitioner's import (I Tr. 126-127). So far as the record reveals the first notice to the government that the pistols stocked by Mogel came from petitioner occurred on October 8, 1969, when Mogel so informed Agent Rowley. By that time petitioner had already imported all the guns which are the subject of this forfeiture action, and within a matter of days thereafter was told by Mogel of Agent Rowley's suspicions.[3]

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[3] Agent Wessler sent the gun he purchased on August 15, 1969, to Washington and informed Agent Westenberger in Washington of its convertibility (I Tr. 1-28; 130). Westenberger was the agent who originally tested the prototypes (II Tr. 54-61). However, because petitioner did not raise the issue of estoppel below, Agent Westenberger was not asked whether he knew the gun he received from Agent Wessler to be one of the petitioner's, and, if so, when he received it and when he discovered its source.

Moreover, the record affirmatively shows that petitioner had no reasonable basis to rely on the Division letters informing him that the prototypes were not "firearms." The evidence clearly showed that the prototypes were significantly different from the manufactured guns and that the latter were readily capable of being converted into firearms. Moreover, prior to receipt of the Division letter as to the prototypes, petitioner had been advised by the manufacturer of the guns that the DA-4 model "should not be accepted by Washington offices as not difficult to drill and suitable to shoot." Petitioner never brought this letter to the attention of the Division or in any way notified it that the manufactured guns were different from the prototypes he had previously submitted. If petitioner had wished to get advance advice from the Division as to production line pistols he was well aware of how to do so. Thus, for the further reason that petitioner's alleged reliance on the prior government notification was unjustified, the estoppel claim must fail.[4]

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[4] Reasonable reliance is a necessary ingredient for estoppel. See *e.g.*, *United States* v. *Georgia-Pacific Co.*, 421 F. 2d 92 (C.A. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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